SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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INDEX NO. 158272/2015

ANDREW HALLAS,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 006, 007

- v -

21 WEST 86 LLC, SWEET CONSTRUCTION CORP. OF LONG ISLAND LLC, SWEET CONSTRUCTION CORPORATION,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 145-162, 164, 172-176, 191-194, 197, 199, 205, 206, 208, 210

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 129-144, 163, 165, 189-190, 195-196, 200, 207, 209

were read on this motion for summary judgment.

By notice of motion, defendants/third-party plaintiffs Sweet Construction Corp. of Long Island LLC and Sweet Construction Corp. (Sweet) (Sweet defendants, collectively) move pursuant to CPLR 3212 for an order summarily dismissing plaintiff's claims against them for violations of Labor Law §§ 240(1), 241(6) and 200 and common law negligence, and all claims against them for common law indemnification and contribution, and granting them summary judgment on their contractual indemnification claim against third-party defendant Consolidated Carpet Workroom, LLC (mot. seq. six). Consolidated opposes, and defendant 21 West 86, LLC cross moves for an order dismissing the complaint and all cross claims against it, or, alternatively, granting it conditional summary judgment on its cross claim against co-defendants for contractual indemnification, granting it judgment on its breach of contract claims against co-

defendants for failure to procure insurance, and/or denying Sweet defendants' motion to the extent they seek dismissal of 21 West's cross claims. Plaintiff opposes both motions to the extent they seek dismissal of his claims for common law negligence and Labor Law §§ 200 and 241(6), and Sweet defendants oppose the cross motion.

By notice of motion, third-party defendants Consolidated and Killian Industries, Inc. move pursuant to CPLR 3212 for an order granting them summary judgment dismissing the third-party complaint and all cross claims arising therefrom (mot. seq. seven). Sweet defendants and 21 West oppose the motion; plaintiff takes no position.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

In his complaint, plaintiff alleges that on May 28, 2014, while employed by Killian and performing construction work at 21 West 86th Street in Manhattan, he was injured when he slipped and fell on construction debris. (NYSCEF 147).

A. Pertinent agreements

1. 21 West and Sweet (NYSCEF 158)

21 West, the owner of the premises, hired Sweet as the general contractor for the project at issue. Pursuant to subparagraph 3.18.1, Sweet agreed to indemnify and defend 21 West from and against all damages and liabilities arising out of or resulting from performance of the work at the project, provided that the claim or damages is attributable, as pertinent here, to bodily injury to the extent caused by Sweet's negligence or by a subcontractor, anyone directly or indirectly employed by Sweet or anyone for whose acts Sweet may be liable. The provision does not "extend to such damages, liabilities, losses or expense to the extent they result from the act or omission, negligence or willful misconduct of an Indemnitee."

Subparagraph 5.2.1 provides that Sweet is fully responsible for the acts, errors, omissions, defaults, and conduct of all subcontractors and suppliers. Sweet is required to obtain, at its sole expense, all required insurance.

2. Sweet and Consolidated (NYSCEF 159)

The scope of the subcontract between Sweet and Consolidated is for the latter to provide all labor, materials, tools, equipment, and scaffolding necessary to complete the wood flooring. Consolidated agreed to defend and indemnify, at its sole expense, Sweet, all entities Sweet is required to indemnify and hold harmless, the owner of the property, and others, against all liability for bodily injury arising out of or resulting from the work covered by the subcontract to the extent such work was performed by or contracted through Consolidated or by anyone for whose acts Consolidated may be held liable, excluding only liability created by the sole and exclusive negligence of the indemnified parties.

Consolidated is required to procure and maintain insurance that would protect Sweet, all entities Sweet is required to indemnify and hold harmless, and the owner, and naming Sweet and the owner as additional insureds, and it waives all rights of subrogation against Sweet and 21 West and any other indemnified party. It is Consolidated's affirmative duty to ensure that any sub-subcontractor that it engaged complies with the insurance and indemnification requirements of the subcontract.

3. Consolidated and Killian (NYSCEF 160)

On February 20, 2014, Consolidated and Killian entered into a master subcontract agreement by which Killian agrees to perform all work identified in Consolidated's purchase order and any other agreements between Consolidated and an owner. Consolidated's contract with persons identified in its purchase order is specifically incorporated by reference so that

Killian is bound to Consolidated to the same extent that Consolidated is bound to the owner.

The agreement's indemnification section provides:

> The Work performed by the Subcontractor shall be at the risk of the Subcontractor exclusively. To the fullest extent permitted by law, Subcontractor shall indemnify, defend (at Subcontractor's sole expense) and hold harmless the Owner, the Contractor, their insurers and all their affiliated companies partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns (the "Indemnified Parties"), from and against any and all claims for bodily injury or death, damage to property, damages, actions, causes of action, suits, losses, judgments, obligations and any liabilities, costs and expenses (including but not limited to. investigative and repair costs, attorneys' fees and costs, and consultants' fees and costs) ("the Claims") which arise or are in any way connected with the Work performed, Materials furnished, or Services provided under this Agreement by Subcontractor or its agents. These indemnity and obligations shall apply to any breach or default, negligent or willful acts, omissions or misconduct of Subcontractor, its employees or agents, whether active or passive. Said indemnity and defense obligations shall further apply, whether or not said claims arise out of the concurrent act, omission, or negligence of the Indemnified Parties, whether active or passive. Subcontractor shall not be obligated to indemnify Contractor against liability for damage arising out of bodily injury . . . to the extent caused by the Contractor.

Killian also agrees to procure certain required insurance.

B. Relevant deposition testimony

1. Plaintiff (NYSCEF 151)

At an examination before trial, plaintiff testified, as pertinent here, that for some seven to eight weeks before his accident, he was working at the premises for Killian installing floors on an ongoing renovation project. When he arrived at the site for the first time to perform work, he received work instructions from Killian's foreperson who instructed Killian employees daily.

Plaintiff was unaware of any accidents at the site before his accident, and he did not remember anyone at Killian complaining about the storage of materials. Rather, he and others complained about the building's maintenance, cleanliness, and debris at the site. He personally complained to his foreperson and to one or two Sweet supervisors that there was "debris all over the place" and that "the amount of debris in the work areas was substantial enough that it should

have been cleaned up." The debris resulted from demolition performed on the floors while he was working, but he did not know who was responsible for it. After he complained, the debris was occasionally cleared away.

The role of Consolidated on the project was to furnish and deliver wood planks, plywood, and 50-pound bags of cement. When plaintiff saw Consolidated's employees bringing the materials into the building, he complained to Killian that it was a contract violation. Thereafter, Consolidated left materials on the sidewalk and Killian employees brought them into the building. Consolidated had no foreperson on site, and other than delivering materials, plaintiff knew of no other role it had on the project.

After Consolidated delivered the flooring material, plaintiff and other Killian employees brought it to the floors on which they worked and stored it on the floors and in the hallways. When moving bags of cement between floors, Killian employees used the stairs rather than the service elevator. Plaintiff did not know if his foreperson knew that Killian employees used the stairs to transport the concrete, and no one had forbidden him from doing so.

On the day of his accident, plaintiff was working on the 15th floor, mixing cement and pouring and filling holes. When he needed more cement, rather than waiting a half-hour for the service elevator to arrive, plaintiff walked up the stairs to the 16th floor, took a bag of cement, and started to walk back down. Plaintiff had never before been to the 16th floor, nor had he ever taken the stairwell between the two floors.

The 16th floor was a "pigsty," with demolition material and rubble all over the place, including chunks of concrete, walls, and pipes. Plaintiff believed it was Sweet's responsibility to clean up the debris, and he occasionally saw Sweet laborers doing so, but not in the stairwell. It was not Killian's responsibility to clean the stairwell.

As there were no lights in the stairwell, workers would prop open the hallway doors to let in light. Plaintiff could see the stairs as he walked down. As he went down a few steps, holding onto a railing with his right hand, he "slipped on something, some debris on the stairs," and fell backwards. He had noticed no debris on the stairs before his fall, but when the ambulance arrived, he saw it and also saw debris in photographs that had been taken immediately thereafter.

Plaintiff opined that the debris resulted from drilling through the wall, and that it was composed of concrete dust, concrete chips, and paint chips. He could think of no reason for his fall other than the debris, but did not remember seeing anyone drilling holes into the wall opposite the stairwell.

2. 21 West (NYSCEF 152)

The senior vice president of the building's management company testified that the company oversaw and designed the project, received requisitions, and ensured that the work was completed. 21 West had no office or headquarters in the building; there was only a leasing office. The senior vice president visited the premises monthly to check on the project's progress. The company employed "laborers" who were not involved in the project but maintained occupied floors. Based on her experience with construction, the senior vice president believed that Sweet was responsible for maintaining the floors under construction and for cleaning and removing construction debris. No one from the company inspected the work areas, although its project manager walked the site. Its manager was not authorized to direct work or interact with workers. Nor were any of its employees authorized to stop work if he or she saw an unsafe work condition or to direct the trades in their work. She received no complaints about debris not being timely cleaned but she received several complaints from building residents that hallways had not been completely cleaned at the end of a given day. There were no complaints about debris in the

stairwells. The senior vice president instructed Sweet's construction manager to clean the hallways. The company supplied no materials, tools, or safety equipment for the project. Its on-site superintendent was responsible for checking the stairwells daily for lighting and cleanliness.

3. Sweet (NYSCEF 153)

Sweet's project superintendent testified that he ran the project at the premises, that Sweet hired Consolidated to install flooring in the building, and that Consolidated sub-contracted the work to Killian. The project superintendent walked through the site daily to determine the work schedule and interacted with the trades to the extent of directing what work needed to be done according to the schedule, but he did not instruct them in how to perform the work. He was authorized to stop and fix unsafe work practices. Sweet held no safety meetings; each subcontractor was told to hold its own.

Sweet hired its own laborers, whose duty it was to sweep or remove debris in work areas, passageways, and stairs, and clean up anything construction-related. The laborers were also instructed to maintain daily all egress areas, including the stairwells. The project superintendent and other Sweet employees were responsible for monitoring the laborers' work.

Construction workers were not permitted to use the stairwell, which was reserved for the tenants' use; Sweet told them not to and reprimanded those who did. Sweet was aware that construction workers used the stairs.

The project superintendent had checked the stairs before plaintiff's accident to ensure that the doors were shut and the stairs were clean, which was part of his daily routine. If he had seen a dangerous condition, he would have cleaned it. Workers employed by the building also had a routine for inspecting and cleaning the stairwells, and they mopped the staircases at night after construction work was finished for the day. Sweet and the building jointly shared responsibility

for cleaning the stairwells.

When the project superintendent arrived at the scene of plaintiff's accident, he saw him lying on the ground. Although he saw no dust on the staircase, he admitted that

> [t]here might have been dust, you know, that normal everyday dust because these guys chock (sic) the doors open, which they weren't supposed to, so the construction dust would go into the stairwell a lot of times. So that's why [Sweet] would have a laborer constantly in the stairwells cleaning them.

4. Killian (NYSCEF 154)

Killian's general foreperson testified that Killian specializes in floor installations and is responsible for the safety of its employees although generally, Sweet told them daily where and when to perform their work. Once given the daily work assignment, Killian's employees would perform the work, supervised only by Killian's foreperson. Killian received logistical information for the project from Consolidated, the principal employee of which was not at the site daily, but when there, he reviewed Kilian's work progress. Consolidated was authorized to direct and control the work of Killian's employees, and to stop unsafe work, although Consolidated's supervisor had told Killian employees that they were to follow directions given by Sweet. Killian's forepersons were required to attend Sweet's weekly safety and site meetings.

Because the elevator between floors was slow, employees usually used the stairs to go between floors. No one directed Killian employees not to use the stairs, and the general foreperson did not recall being told that one of the stairwells was reserved for tenants. Both stairwells had adequate overhead lighting, and the doors were sometimes propped open, which he assumed was for air flow.

It was not within the scope of Killian's work to clean the site. Rather, Killian would ask Sweet or one of the building's laborers to do it. The general foreperson denied that anyone had complained about dirt in the stairwells before plaintiff's accident, and he never saw debris or

anything unsafe there. Building porters washed down the stairs but the general foreperson did not know if it was required. No construction work, however, was performed in or on the stairs, and he recalled that tenants in the building had complained about dust getting into their apartments.

The general foreperson had seen the photographs taken immediately after plaintiff's accident, and he identified particles near plaintiff's knee as gravel. He opined that the type of debris seen in the pictures could not have been cement as it had a different texture.

5. Non-party superintendent (NYSCEF 155)

The premises superintendent, a former employee of the building's managing agent, testified that his duties included maintaining the premises and cleaning the stairwells. Sweet's workers cleaned the hallways and floors at the end of each day; he and other building personnel did no cleaning related to the construction. If he saw that something had not been cleaned, he called Sweet to do it. Sweet was responsible for cleaning the stairwells to the extent of cleaning anything related to the construction. The premises superintendent observed two employees, directed by Sweet, daily sweeping the stairwells. Had he seen debris in the stairwells, he would have told Sweet's project manager, who would take care of it.

While construction workers were not permitted to use the stairwell reserved for tenants, the premises superintendent was aware that they were doing so, and he checked the stairwells at the end of each day to ensure that they were lit. No construction work was performed in the stairwells and he never observed debris in the stairwells and received no such complaints. During the project, tenants complained him to him about dust and debris.

6. Consolidated (NYSCEF 156)

Consolidated's director of human resources and risk management testified that for the project at issue, Consolidated had no forepersons or supervisors daily present at the site. Rather,

its role was to supply and deliver materials; it did not install material at the project. If Consolidated and Killian were performing work at the same site, Consolidated would not be in charge of Killian's work, nor would it direct or control it. Killian was responsible for the site safety of its own employees.

C. Pictures (NYSCEF 161)

Color pictures taken immediately after the accident depict plaintiff lying on his back on the stairs with the bag of concrete underneath his head. Dust or debris is on the left side of each step and some dust appears on the left side of plaintiff's body. Toward the bottom of the staircase, there is debris or particles mixed in with dust.

II. SWEET DEFENDANTS' MOTION

A. Causation

Sweet defendants contend that plaintiff's speculation as to the cause of his fall is fatal to his claim, observing that he testified that he saw no debris on the stairs before he fell and that only after his fall did he see dust and debris on the stairs, which he assumes caused his fall. (NYSCEF 146). Plaintiff argues that this testimony demonstrates that he slipped on something on the stairs which he identified as dust or debris, and that the photographs show the dust and/or debris on him and on the stairs. (NYSCEF 193).

As plaintiff's evidence supports his allegation that he fell due to the dirt or debris on the stairs, Sweet defendants fail to establish, *prima facie*, that plaintiff is unable to identify the cause of his fall. (*See e.g., Davis v Sutton*, 136 AD3d 731 [2d Dept 2016] [viewing evidence in light most favorable to plaintiffs, as nonmoving parties, defendants failed to establish that injured plaintiff did not know cause of fall; deposition testimony demonstrated triable issue as to whether plaintiff tripped and fell on uneven condition]).

B. Plaintiff's Labor Law § 200 and common law negligence claims against Sweet

Based on the lack of evidence that Sweet created the debris, plaintiff's testimony that he observed no debris on the stairs before his fall, the denial of Sweet's project superintendent of having seen any debris, and Sweet's lack of a duty to inspect the stairwell for debris, Sweet denies having directed or controlled plaintiff's work or having created or had actual or constructive notice of the alleged unsafe condition. (NYSCEF 146).

Pursuant to Labor Law § 200, an owner may be held liable for a dangerous condition on premises if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546, 548 [1st Dept 2018]). Likewise, a contractor may be held liable if it had actual or constructive notice of the dangerous condition, and had control over the worksite. (*Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009], quoting *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]).

It is undisputed that Sweet, as the general contractor, controlled the worksite. Sweet's project superintendent testified that Sweet hired its own laborers whose duties included daily cleaning and sweeping and removing debris in work areas, passageways, and stairs, that the laborers were instructed to maintain the stairwells daily, and that Sweet was responsible for monitoring their work. The project superintendent also had a daily routine of checking stairwells to ensure that the stairs were clean, and he admitted that there may have been construction dust on the stairs. He also acknowledged Sweet's duty to clean the stairwells, that it had undertaken to do so, and that it was aware that there was a recurring dust and debris on the stairs. Moreover, 21 West's managing agent testified that Sweet was responsible for maintaining the floors under construction and cleaning and removing construction debris, and that she had instructed Sweet's construction manager to clean the dust from the hallways. Killian's general foreperson

disavowed responsibility for site cleaning and asked Sweet or the building's workers to do it, and 21 West's superintendent testified that Sweet was responsible for cleaning the stairwells of anything construction-related, that he saw two employees directed by Sweet daily sweeping the stairwells, and that had he seen debris in the stairwells, he would have informed Sweet, who would have taken care of it.

That plaintiff and others denied seeing dust or debris on the stairwell before the accident, despite having had inspected or traversed it earlier is of no moment as other testimony raises an issue as to whether the dust and debris constituted a recurring condition of which Sweet had actual or constructive notice and failed to address. (*See e.g., Willis v Galileo Cortlandt, LLC*, 106 AD3d 730 [2d Dept 2013] [triable issues of fact existed as to whether defendants had constructive notice on theory that they were aware of recurring condition in area where accident occurred which they failed to adequately address]; *Diaz v NY Affordable Housing Dekalb Assocs. LLC*, 147 AD3d 555 [1st Dept 2017] [even if defendant met burden of showing lack of notice of unsafe condition, witnesses' testimony raised triable issue as to whether condition was recurring problem about which they had complained to defendants]; *Bido v 876-882 Realty, LLC,* 41 AD3d 311 [1st Dept 2007] [triable issues raised as to whether accumulation of refuse in stairwell was dangerous and frequently unremedied recurring condition that caused plaintiff's injury]).

Moreover, Sweet's denial of having had a duty to clean the stairwell given the prohibition against its use by workers is contradicted by the testimony of plaintiff and Killian's foreman, who each denied that Killian employees had been so instructed, and Sweet's employee and 21 West's superintendent were aware that workers used that stairwell. In any event, Sweet's employee conceded that its laborers daily cleaned the stairwell.

Sweet therefore fails to demonstrate, *prima facie*, that it had no duty to clean the

stairwells or that it did not create the debris or have actual or constructive notice of it. (*See DeMercurio v 605 W. 42nd Owner LLC*, AD3d , 2019 NY Slip Op 03550 [1st Dept 2019] [triable issues raised as to whether general contractor had notice of hazardous dust on floor, given testimony that it employed superintendents who broadly supervised and controlled work site and conducted multiple daily walk-throughs]).

B. Plaintiff's Labor Law § 241(6) claim

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Moreover, an owner is absolutely liable for the negligence of a contractor and subcontractor, and a contractor may be held liable for the negligence of a subcontractor, even if it neither supervised nor controlled the work site. A party to whom supervision is delegated may also be held liable. (*Barreto v Metro. Transp. Auth.,* 25 NY3d 426, 434-435 [2015]).

While Sweet denies that any of the Industrial Code provisions referenced by plaintiff in his pleadings is applicable, plaintiff addresses only Industrial Code §§ 12 NYCRR § 23-1.7(e) and (f). Thus, he is deemed to have waived reliance on any other violations as a predicate for his Labor Law § 241(6) claim.

1. Violation of 12 NYCRR § 23-1.7(e)(1) and (2)

(e) Tripping and other hazards.

(1) Passageways.

All passageways shall be kept free of accumulations of dirt and debris and from any other obstruction or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas.

The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Sweet contends that these subsections are inapplicable as plaintiff claims that he slipped, not tripped, on debris on the stairs. Plaintiff asserts that it is irrelevant whether he slipped or tripped.

The cases on which plaintiff relies articulate no clear test as to when an alleged slip may be deemed a trip within the meaning of section 23-1.7(e)(1) or (2). In any event, plaintiff consistently alleges that he slipped. At his deposition, he opined that the debris on which he had slipped was composed of concrete dust, concrete chips, and paint chips. Absent any allegation that the dust and chips formed an accumulation on which plaintiff could have tripped, as opposed to slipped, and as the photographs depict only dust on the top steps where he had fallen, it would be an unwarranted stretch of the statutory word "slip" to find that he had tripped. Thus, Sweet demonstrates, *prima facie*, that plaintiff's accident does not fall within the purview of 12 NYCRR § 23-1.7(e). (*Cf Serrano v Consolidated Edison Co. of N.Y., Inc.*, 146 AD3d 405 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [slip and fall on accumulation of paint chips and dust falls within statute]).

2. Violation of 12 NYCRR § 23-1.7(f)

(f) Vertical passage.
Stairwells, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Plaintiff contends that this subsection applies to his accident as he needed to use the stairs to transport the concrete, and the stairs were unsafe.

To the extent that this statute requires that a staircase be "safe" (*see Vasquez v Urbahn Assocs. Inc.*, 79 AD3d 493 [1st Dept 2010] [subsection imposes duty to provide safe staircase, free of defects]; *see also Garcia v Neighborhood Partnership Hous. Dev. Fund Co., Inc.,* 113 AD3d 494 [1st Dept 2014] [unclear whether staircase or surrounding framing defective]), it must

be without defect, and here, there is no allegation that the stairs were defective. Rather, they were allegedly unsafe due to the debris, and plaintiff cites no authority for the proposition that debris on stairs constitutes a violation of this subsection.

Sweet thus establishes, *prima facie*, that this section of the Industrial Code is inapplicable here, and plaintiff raises no triable issue.

C. Plaintiff's Labor Law § 240(1) claim

Having failed to object to dismissal of this claim, plaintiff is deemed to have waived it.

D. Common law indemnification and contribution claims against Sweet

A party seeking common law indemnification must not only prove that it was not negligent in causing plaintiff's accident, but also that the proposed indemnitor was negligent or, if not negligent, was authorized to direct, supervise, and control the work giving rise to the injury. (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754 [2d Dept 2018]). Thus, in *Fedrich*, where the owner and general contractor sought indemnity from the subcontractor, the subcontractor submitted evidence that

> during the course of the construction, the trade contractors were piling their debris on the floor of the subject building, which was then removed by laborers employed by and/or under the supervision of [the owner and general contractor]. [The subcontractor] demonstrated that [the owner and general contractor] had certain responsibilities with respect to the removal of the construction debris and, thus, that they would not be able to prove themselves free from negligence in the event that the injured plaintiff is successful on his claims against [the subcontractor].

(*Id.* at 756-757). The owner and general contractor were thus unable to prevail on their indemnity claims against the subcontractor. (*Id.*).

As Sweet does not establish that it may not be held liable for violating Labor Law § 200 and common law negligence (*see supra*, II.B.), it is not entitled to dismissal of the cross claims against it for common law indemnity and contribution. (*See Haynes v Boricua Vil. Hous. Dev.*

Fund Co., Inc., 170 AD3d 509 [1st Dept 2019] [as issues existed as to defendants' negligence, court properly denied motions for dismissal of and judgment on indemnification claims]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621 [1st Dept 2015] [not matter of law that owner and contractor not liable to plaintiff on common law negligence and Labor Law § 200 claims, summary judgment on claim for common law indemnity against subcontractors not granted]).

E. Sweet's contractual indemnification claim against Consolidated

As the agreement between Sweet and Consolidated requires Consolidated to indemnify Sweet, unless "liability [is] created by the sole and exclusive negligence of the indemnified parties," and as Sweet does not demonstrate that plaintiff's accident was not caused by its sole and exclusive negligence, it is therefore not entitled to judgment on its claim for contractual indemnification against Consolidated. (*Haynes*, 170 AD3d at 511; *Valdez v Turner Constr. Co.*, AD3d , 171 AD3d 836 [2d Dept 2019] [defendants' motion for judgment on cross claims for contractual indemnification properly denied as they failed to eliminate triable issues as to whether they were negligent in causing accident]; *Rodriguez v Heritage Hills Soc., Ltd.*, 141 AD3d 482 [1st Dept 2016] [owner entitled to judgment on cross claim for contractual indemnification against contractor only on condition that owner is found free from negligence]; *see also Fedrich*, 165 AD3d at 756-757 [party seeking contractual indemnity must prove itself free from negligence]).

F. Claims against Sweet Construction Corp. of Long Island LLC

Unopposed.

III. 21 WEST'S CROSS MOTION

A. Plaintiff's claims

The sole remaining claims against 21 West are those brought pursuant to Labor Law

§§ 200 and 241(6) and common law negligence.

Here, 21 West's witnesses testified that employees of its managing agent were responsible for checking the stairwells daily for lighting and cleanliness, and the building's superintendent conceded that his duties included cleaning stairwells. Moreover, Sweet's witness testified that workers employed by the building routinely inspected and cleaned the stairwells, and mopped the staircases at night after construction work finished for the day, and that Sweet and 21 West jointly shared responsibility for cleaning the staircases. They all testified that there had been complaints about dust and debris related to the construction.

21 West thus fails to establish that it had no actual or constructive notice of the dust and debris on which plaintiff slipped and is therefore not entitled to dismissal of plaintiff's Labor Law §§ 200 and common law negligence claims against it.

B. Cross claims against Sweet

As the parties' contract requires Sweet to indemnify 21 West only to the extent that any liability does not result from 21 West's acts, omissions, or negligence, and 21 West does not establish that plaintiff's accident did not result from its acts, omissions or negligence, 21 West is not entitled to judgment on its cross claim.

Sweet does not oppose or address 21 West's motion seeking judgment on its cross claim against it for failure to procure the requisite insurance.

III. THIRD-PARTY DEFENDANTS' MOTION

A. Contractual indemnification claims

Killian contends that absent an indemnity agreement between it and Sweet, Sweet's contractual indemnification claim against it must be dismissed. Sweet does not oppose.

Consolidated argues that its agreement with Sweet does not require it to indemnify Sweet

if plaintiff's accident was caused by Sweet's negligence, and that the evidence shows that Sweet's failure to clean the debris from the stairwell was the cause of the accident.

As there has been no finding of liability yet, dismissal of this claim is premature. Moreover, Consolidated's argument that it need not indemnify Sweet as it performed no work under the contract which caused or contributed to plaintiff's accident is meritless as it is contractually required to indemnify Sweet for liability arising out of the work to the extent performed by Consolidated "or contracted through [Consolidated] or by anyone for whose acts [Consolidated] may be held liable." As Consolidated contracted with Killian to perform the flooring work for Sweet, the indemnity provision applies to Consolidated.

B. Common-law indemnity and contribution

Killian asserts, without opposition, that as it was plaintiff's employer and as plaintiff did not suffer a grave injury, it may not be held liable for common-law indemnification pursuant to Workers' Compensation Law § 11. Consolidated asserts, also without opposition, that absent any active negligence on its part, Sweet's claims for contribution and common-law indemnification against it must be dismissed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Sweet Construction Corporation's motion for summary judgment (sequence six) is granted to the extent of: dismissing (1) plaintiff's Labor Law § 240(1) claim against it, and (2) dismissing plaintiff's Labor Law § 241(6) claim against it; (3) denying dismissal of any claims against it for common law indemnification and contribution; and (4) denying judgment on its cross claim against Consolidated for contractual indemnification;

ORDERED, that defendant Sweet Construction Corp. of Long Island LLC's motion to

dismiss all claims and cross claims against it is granted, and all claims and cross claims against it are severed and dismissed; it is further

ORDERED, that defendant 21 West 86 LLC's cross motion for summary judgment is granted to the extent of dismissing (1) plaintiff's Labor Law § 240(1) claim against it, and (2) dismissing plaintiff's Labor Law § 241(6) claim against it; (3) denying judgment on its cross claim against Sweet Construction Corp. for contractual indemnification; and (4) granting judgment on its cross claim against Sweet Construction Corp. for failure to procure insurance, with damages to be determined at the time of trial; it is further

ORDERED, that third-party defendants' motion for summary judgment (sequence seven) is granted to the extent of: (1) severing and dismissing the third-party complaint as against Killian Industries, Inc. in its entirety; and (2) severing and dismissing the third-party claims for common-law indemnification and contribution as against third-party defendant Consolidated Carpet Workroom, LLC; and denied as to dismissing the third-party claim for contractual indemnification as against Consolidated.

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5/22/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE